SUPREME COURT, U. S.
No. 825
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In the Supreme Court of the United States

OCTOBER TERM, 1969

J. D. McCARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisidiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Agnew v. *United States*, 165 U.S. 36	8
Allen v. *United States*, 164 U.S. 492	8
Berkowitz v. *United States*, 213 F. 2d 468	7, 9
Bloch v. *United States*, 221 F. 2d 786	7
Cramer v. *United States*, 325 U.S. 1	8
Crews v. *United States*, 160 F. 2d 746	8
Debs v. *United States*, 249 U.S. 211	8
Elbel v. *United States*, 364 F. 2d 127, certiorari denied, 385 U.S. 1014	11
Helms v. *United States*, 340 F. 2d 15	10
Imholte v. *United States*, 226 F. 2d 585	11
Koehler v. *United States*, 189 F. 2d 711, certiorari denied, 342 U.S. 852	8
Leary v. *United States*, 395 U.S. 6	7
Mann v. *United States*, 319 F. 2d 404, certiorari denied, 375 U.S. 986	9, 10
Myres v. *United States*, 174 F. 2d 329	8
Roper v. *United States*, 54 F. 2d 845	11
Sherwin v. *United States*, 320 F. 2d 137, certiorari denied, 375 U.S. 964	10, 11
United States v. *Barash*, 365 F. 2d 395	9
United States v. *Littlejohn*, 96 F. 2d 368, certiorari denied, 304 U.S. 583	11
United States v. *Releford*, 352 F. 2d 36	11
United States v. *Wilkins*, 385 F. 2d 465, certiorari denied, 340 U.S. 951	10

Cases—Continued

	Page
Walsh v. *United States*, 174 Fed. 615	11
Wardlaw v. *United States*, 203 F. 2d 884	7, 9

Statutes and rule:

Internal Revenue Code of 1954:	
Sec. 176a (26 U.S.C. 176a)	7
Sec. 7201 (26 U.S.C. 7201)	2, 3
Sec. 7206 (26 U.S.C. 7206)	2, 3
Fed. R. Crim. P., Rule 30	7

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 323

J. D. MCCARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. i-xiii) is reported at 409 F. 2d 793.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1969 (Pet. i), and a petition for rehearing was denied on June 5, 1969. The petition for a writ of certiorari was filed July 10, 1969, and is thus out of time under Rule 22 of the Rules of this Court.

QUESTION PRESENTED

Whether the trial court committed plain error in instructing the jury on the element of wilfulness.

STATUTES INVOLVED

The Internal Revenue Code of 1954 provides:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[26 U.S.C. 7201.]

SEC. 7206. FRAUD AND FALSE STATEMENTS.

> Any person who—
>
> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

[26 U.S.C. 7206.]

STATEMENT

After a jury trial, petitioner was convicted on one count charging that he had wilfully attempted to evade his income tax for the year 1962 by filing a false and fraudulent tax return, in violation of Section 7201 of the Internal Revenue Code of 1954; and on one count of wilfully making and subscribing (under the penalties of perjury) an income tax return for 1962 which he did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Code (R. 854-856). Petitioner was sentenced to three years' imprisonment on the evasion count. Imposition of sentence on the false statements count was suspended and petitioner was placed on probation for three years, to commence upon the expiration of the sentence imposed on the evasion count.

The government proved by both the specific items method (direct evidence) and the net worth method, that a large part of petitioner's 1962 income was not reported on his income tax return. That return showed taxable income of $13,427.33 (R. 23). The government proved that in 1962 petitioner received twelve monthly checks, each in the amount of $1,000, from the Oklahoma City Chamber of Commerce as fees for services rendered, none of which were reported on his return (R. 181-182, 186). Petitioner admitted that he had received these checks (R. 770-771). In addition the government proved by direct evidence that in 1962 petitioner had received $10,038.22 of unreported income from "insurance com-

missions and counselling." The total of petitioner's 1962 unreported income as shown by the specific items method was therefore $22,038.22 (R. 475-477). As corroboration, the government introduced a complete net worth-expenditures analysis, showing that petitioner's net worth increased by $26,764.50 in 1962 (R. 505). After adding to this increase petitioner's non-deductible expenditures and giving him credit for $1,288 of non-taxable funds he received in 1962 (R. 518), his taxable income as reconstructed for 1962 was $34,114.59 (R. 519). The net worth figures therefore showed unreported taxable income of $20,687.26 (R. 519), and a corrected income tax of $11,626.50, as compared to the $3,317.39 reported on the return. Thus, 71.5 percent of the true tax liability was not disclosed on the tax return (R. 525). The correctness of these figures was generally corroborated by two expert witnesses who appeared for the defense (R. 640-642, 677-682, 801-803, 809).

Petitioner's 1962 return was prepared by one Stevens from information petitioner furnished him (R. 26, 32-33). Stevens did not examine any of petitioner's records but relied entirely upon the information petitioner furnished him orally and in writing (R. 35, 37). During the investigation, petitioner told a Treasury agent that in preparing his tax figures for the accountant "he [petitioner] with his secretary would go through the checks, canceled checks, and determine the expenses listed on the return, the itemized deductions, would go through the deposits to determine income, and go through his accounts current billing from the insurance company to determine his

commissions, indirect commissions" (R. 356-357). Petitioner admitted at the trial that he understood his own accounting records (R. 760).

Instructing the jury on the element of wilfulness, the trial Judge charged them as follows:

> The gist of the crime consists of wilfully attempting to escape the tax. The attempt to evade and defeat the tax must be a wilful attempt. That is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax law which it was the duty of the defendant to report to the Government.
>
> The attempt must be intentionally done with the intent that the Government should be defeated of the income tax due from the defendant.
>
> "Wilful" implies bad faith and evil motive. The word "knowingly" as used in [the count relating to evasion] means the doing of an act or acts voluntarily and intentionally. [R. 857-858.]
>
> * * * *
>
> You are instructed that a tax return may be false because it is merely incorrect due to negligence or some other cause lacking in intent, or not involving a tax. Such a return is not necessarily wilful or an attempt to evade taxes.
>
> Thus in this case if you find that the defendant did fail to report income, but that such failure was due to negligence, inadvertance, or a misunderstanding of the law, or some other cause lacking in intent, then you must vote to acquit even though the failure to report does technically make the return a false return. [R. 863.]
>
> * * * *

With respect to a major crime, such as charged in this case, specific intent must be proved before there can be a conviction.

A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent.

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means.

While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there could be no eyewitness account of the state of mind with which the act or acts were done or omitted; but what the defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.

So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused. [R. 871-872.]

ARGUMENT

As we have noted, this petition for a writ of certiorari was filed five days out of time. In any event,

there is no reason for review by this Court of the sole question presented, whether the trial court committed plain error[1] in giving the jury the instructions embodied in the last two paragraphs of its charge on wilfulness quoted in the Statement, *supra*, p. 6.

These paragraphs are free of the errors that characterized the instructions in *Wardlaw* v. *United States*, 203 F.2d 884 (C.A. 5), *Berkovitz* v. *United States*, 213 F.2d 468, and *Bloch* v. *United States*, 221 F.2d 786 (C.A. 9). The instructions in those cases referred to a "presumption" that a person intends the natural consequences of his acts, and stated that this presumption would arise simply from a conscious omission of income.[2] Here, on the other hand, the

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[1] Fed. R. Crim. P. 30 requires that in order to assign any portion of a charge as error, a party must object to it before the jury retires to consider its verdict. The obvious and salutary purpose of the requirement is to permit the judge to correct any error before submission, and thus avoid the necessity of retrial. That purpose is not served by a post-verdict motion for acquittal or new trial, such as petitioner filed in this case. Accordingly, the court below correctly treated the issue as being whether or not plain error had occurred (Pet. App. xiii). Nor is *Leary* v. *United States*, 395 U.S. 6, to the contrary. The objection there *was* raised prior to submission of the case to the jury, by motion for directed verdict; in that case the statutory presumption of 26 U.S.C. 176a was involved and it was clear from the start both that the attack went to the statute and that the statute would be relied upon. No such special circumstances exist here.

[2] The instruction in *Wardlaw* and *Berkovitz* stated:

> The presumption is that a person intends the natural consequences of his conscious acts, and a natural pre-

jury was told only what it was reasonable to infer. There was no suggestion of a legal requirement of inference, of necessary probative weight to be given any inference, or of other offense to the presumption of innocence. Nor does the instruction given here state that a specific intent to evade taxes can be inferred from the mere omission of items of gross income.

The first part of the instruction simply repeats what has been, for many years, the standard instruction on circumstantial evidence of intent—that a man generally intends the normal consequences of his acts.[3] The instruction is as necessary and proper in a prosecution for tax evasion as in any other case. The normal consequence intended in omitting large amounts of income from a tax return is that the income will not be taxed. To this intent that certain

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sumption would be if a person consciously, knowingly, or intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

The instruction in *Bloch* stated:

> The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes; that he intended to defeat the tax.

[3] See, *e.g.*, *Allen* v. *United States*, 164 U.S. 492, 496; *Agnew* v. *United States*, 165 U.S. 36, 53; *Debs* v. *United States*, 249 U.S. 211, 216; *Cramer* v. *United States*, 325 U.S. 1, 31; *Crews* v. *United States*, 160 F. 2d 746, 750 (C.A. 5); *Myres* v. *United States*, 174 F. 2d 329, 334 (C.A. 8); *Koehler* v. *United States*, 189 F. 2d 711, 713 (C.A. 5), certiorari denied, 342 U.S. 852.

items should not be taxed must be added a knowledge that they were taxable in order to find the element of wilful intent to evade taxes which is necessary for a violation of the statute. Whether it is reasonable to infer that the defendant knew that the omitted items of income were taxable depends upon all the evidence, including the defendant's education and experience, his treatment of other identical items, the size and character of the income, and any conduct suggesting or belying guilty knowledge. The instruction also covered this point fully and fairly. Unless the contrary appears from the evidence, the court charged, "the jury *may* draw the inference and find that the accused intended all of the natural and probable consequences which one *standing in like circumstances and possessing like knowledge* should reasonably have expected to result * * *." (Emphasis supplied.) The instruction was well attuned to the evidence. The evidence tended to prove that a large part of petitioner's 1962 income was not reported, that defendant gave his accountant incomplete information, and that petitioner's method of keeping his books would have shown him his true income as he was giving the accountant these figures. Manifestly, it was these "acts" and "circumstances" and "knowledge" in the light of which the instruction permitted the inference of a guilty intent to be drawn.

Most of the cases cited in the petition and in the opinion below for the proposition that there is confusion or conflict among the circuits share the flaws of *Wardlaw*, *Berkovitz* and *Bloch*. The exceptions are *United States* v. *Barash*, 365 F.2d 395 (C.A. 2),

where there was a timely objection to the charge, and *Mann* v. *United States*, 319 F.2d 404 (C.A. 5), certiorari denied, 375 U.S. 986. While the Fifth Circuit did hold in *Mann* that the charge given here was plain error, no circuit, including the Fifth (cf. *Helms* v. *United States*, 340 F.2d 15 (C.A. 5)), has ever followed that decision. Like the court below, they have tended to follow the contemporaneous contrary holding of *Sherwin* v. *United States*, 320 F.2d 137 (C.A. 9), certiorari denied, 375 U.S. 964, where the charge was upheld despite objection. *Sherwin* and *Mann* were before this Court simultaneously during the 1963 Term. While the government filed a protective petition in *Mann*, it basically opposed certiorari, on the ground that the correctness of the charges depended so heavily upon the evidence introduced at the trials that there was neither necessary inconsistency in the rulings nor prospect that review in this Court would give further guidance to lower courts. Both petitions were denied.[4]

Even assuming, for the sake of argument, that the instruction, standing alone, may have confused the jury, the rule (whether it be the "presumption" instruction, or the "inference" instruction involved in this case) is that the challenged instruction must be read in context with the total charge in order to see whether the jury was properly instructed on the issue of wilfulness. *United States* v. *Wilkins*, 385 F.2d 465, 473-474 (C.A. 4), certiorari denied, 340 U.S.

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[4] Certiorari was denied in *Sherwin*, No. 519, 1963 Term, on January 6, 1964, and in *Mann*, No. 662, 1963 Term, on January 13, 1964.

951; *United States* v. *Releford*, 352 F.2d 36 (C.A. 6); *Walsh* v. *United States*, 174 Fed. 615, 618-619 (C.A. 7); *United States* v. *Littlejohn*, 96 F.2d 368, 381-382 (C.A. 7), certiorari denied, 304 U.S. 583; *Imholte* v. *United States*, 226 F.2d 585, 590-591 (C.A. 8), *Sherwin* v. *United States*, 320 F.2d 137, 148-151 (C.A. 9), certiorari denied, 375 U.S. 964; *Roper* v. *United States*, 54 F.2d 845, 847 (C.A. 10); *Elbel* v. *United States*, 364 F.2d 127, 134 (C.A. 10), certiorari denied, 385 U.S. 1014. In the instant case, as in *Sherwin*, the jury was emphatically charged on the distinction between wilful fraud and negligent or careless oversight (*supra*, pp. 5-6). In these circumstances we are unable to see how the court's charge could somehow have given the jury the idea that the burden of proof on the issue of intent had been shifted from the prosecution to the defense. The only question here was whether, when he filed the false tax return, petitioner knew it was false. The jury instructions did not permit the jury to substitute a rule of law for solid proof on that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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